Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

COMMERCIAL ENERGIES, INC.,

Petitioner,

v.

RICHARD J. DANZIG, SECRETARY OF THE NAVY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MUNDT
Counsel of Record
WARREN & MUNDT, P.C.
Attorneys for Petitioner
405 South Cascade Avenue
Suite 301
Colorado Springs, Colorado 80903
(719) 578-1152

153118

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Is a Government Contractor's right to damages wrongfully and improperly determined when an Administrative Board finds that entitlement exists under the terms of the Contract but then applies a theoretical test for quantifying the damages, contrary to the terms of the Contract and contrary to the filed rate doctrine?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding. Petitioner, Commercial Energies, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock. The Secretary of the Navy is the official representative of the United States of America.

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Appendix B — Opinion Of The Armed Services Board Of Contract Appeals By Administrative Judge James Dated January 26, 1998 ..... 11a

Petitioner, Commercial Energies, Inc., respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported as *Commercial Energies, Inc., v. Richard J. Danzig, Secretary of the Navy*, Appendix A. The opinion of the Armed Services Board of Contract Appeals in Appeal of Commercial Energies, Inc., can be found at Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on March 10, 1999. This Petition for Writ of Certiorari is timely filed within ninety (90) days from the date judgment was entered.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This Petition concerns damages due Petitioner, Commercial Energies, Inc., under a Requirements Contract for the supply and transport of natural gas. This Contract represented the first time Respondent had ever purchased natural gas and transportation on an interstate pipeline other than directly from a regulated utility. This Contract came about as a result of natural gas deregulation in 1987 and 1988. The Respondent had never awarded or administered

a Contract which involved pipeline tariffs and change in tariff rates. The tariff by which the transportation cost adjustment was to be calculated does not incorporate references to the Contract price between the parties nor does the tariff make any distinction between the cost of gas delivered to the customer and the cost of gas used for calculating a transportation cost adjustment. The Contract specifies that the Contractor is to be paid transportation costs based on the tariff rate set by the Federal Energy Regulatory Commission (FERC).

The Contract contained three clauses bearing on the transportation cost adjustment: C.4, H.10 and H.14[1]. In the

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1. Clause C.4: *Development of Government Pricing Structure*, a. Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless one of tow following situations arises: First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state, or local regulatory authority. Offerors are advised that price adjustments will not be made due to the inability to obtain a transportation discount when such a discount is reflected in Section B unit prices. Second, city gate prices may be adjusted during the contract period if the comparable price for delivery to the DOD installation exceeds the ceiling price for natural gas as defined in Section H.09. This should occur because of an increase in transportation rates, a decrease in the otherwise applicable local distribution company tariff, or a combination thereof. In such instances, the Government will cease orders or nominations of gas for as long as the ceiling price is exceeded. Contractors at their sole option, however, may adjust unit prices so that the ceiling price is no longer exceeded (Cont'd)

(Cont'd)

and the Government will then resume gas ordering. The redetermined price will apply for a period of time as specified by the contractor or the expiration of the contract period, whichever occurs first. b. Title to offeror's gas shall be transferred no sooner than delivery at the city gate, and transportation to the city gate will be arranged by and provided on behalf of the offeror. The Government will be responsible for transportation from the city gate by North Shore. Offerors will be required to assist the Government in securing such transportation service.

Clause H.10: *Ceiling Cost for Natural Gas*, The Government is not required to order gas under this contract if such orders require payments to the contractor and to transporters in any month for natural gas consumed that would be greater than the "Ceiling Cost" for natural gas. The Ceiling Cost will be 95.0 percent of the tariff cost per North Shore Service Classification 2 and 3, or their equivalent. Contractor's "Comparable Price" for purposes of Ceiling Cost comparisons shall be the sum of contractor's applicable Section B city gate price plus all applicable transportation rate and demand rate payable to North Shore.

Clause H.14: *Transportation Price Adjustments*, a. If transportation service to the city gate is to be provided under a regulated tariff, the following provisions shall apply: (1) If during the term of this contract the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the Section B transportation prices, the Contracting Officer shall amend the contract and pay for such transportation service at the higher or lower rates from and after the date when such new rate is made effective. (2) If during the term of this contract an application is made to revise the tariff governing transportation services, the contractor shall promptly notify the Contracting Officer and provide a copy of such applications, petitions, revised schedules, or approved tariffs to the Contracting Officer. b. In the event transportation service from the city gate is to be provided by other than North Shore, the contractor shall specify a rate for such service in terms of cents per decatherm. This rate shall remain fixed during the applicable contract period.

first hearing addressing entitlement only, the Armed Services Board of Contract Appeals (ASBCA) held that Petitioner was entitled to lost profits for breaches of Contract by the Government which prevented Petitioner from transporting gas in November 1989 and July 1990. Further, the ASBCA held that the amount of damages due for the transportation price adjustment for each month in which a FERC tariff revision occurred was to be measured by the documented tariff revision(s). At this point, the ASBCA was in agreement with the filed rate doctrine first upheld by the Supreme Court in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). The filed rate doctrine provides that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged. Later, the Supreme Court expanded this doctrine to hold if Congress grants exclusive authority over rate regulation to a federal regulatory body, then under the "filed rate" doctrine, no rate other than the one on file may be used because this would usurp a function assigned to a federal regulatory body. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 57, 101 S. Ct. 2925, 69 L. Ed. 20856 (1981).

Petitioner seeks recovery of the unpaid balance due on its Contract relating to the difference between the Contract price for transportation prices and the amount for transportation prices as set by FERC's tariff rates. In order to determine this difference, and whether there is any affect on actual cost, it is necessary to compare what Petitioner has been paid with what Petitioner is entitled to be paid per published tariff rates. Such a computation can be accomplished in a straightforward manner and does not require use of theoretical rates as applied by the ASBCA.

After a second hearing, which addressed Quantum (damages), the ASBCA issued its Opinion which held that the Petitioner had not submitted proof of actual costs paid to all of its natural gas suppliers, which in the Board's mind would have been the most direct evidence by which the Transportation Price Adjustment could be determined. (App. B, P.25a) Clause 4 in the Contract did not require Petitioner to submit those costs which the ASBCA found would constitute the most direct evidence. The Contract required Petitioner to submit copies of the tariff revisions for the months in which transportation costs either increased or decreased and to make adjustment in the price Petitioner had been paid for such transportation costs by the Government as stated in the Contract.

The ASBCA did not explain why it had changed the test from that stated in the Entitlement Decision, *i.e.* to determine the transportation price adjustment for each month in which a tariff revision made by FERC had occurred. Petitioner's costs to its suppliers had never been subjected to Audit at Respondent's request. Nor had either party to the Contract ever interpreted that the Contract called for Petitioner to produce proof of actual costs paid the suppliers. To the contrary, Petitioner presented that proof specified both by Clause 4 and recognized by ASBCA: evidence of tariff revisions made by FERC per copies of the documented tariff revision(s).

The ASBCA erred in finding that neither party presented the most direct evidence when Clause C.4 did not require such evidence. Petitioner presented expert testimony from two experts that the method used by Petitioner complied with the natural gas industry standard for calculating a Transportation Cost Adjustment. The

Federal Circuit Court of Appeals upheld the ASBCA's Quantum methodology by upholding use of a comparison of "theoretical" transportation charges which were in effect at the time of Contract award with the theoretical transportation charge at the time of each gas delivery. As a result of such a comparison, the ASBCA calculated an adjustment of $1,145.79. Petitioner's calculations, based on the FERC tariff revisions, resulted in $277,902.25 due for the transportation price adjustment. (App. B, p. 20a) Respondent's calculations resulted in $253,000 due Petitioner. The Federal Circuit Court of Appeals found that substantial evidence supported the theoretical transportation rates used by the ASBCA and affirmed the quantum decision awarding $1,145.79 to Petitioner. (App. B, p. 24a and App. A, p. 10a)

Affirming the Quantum Decision was erroneous as a matter of law because the Contract Clause C.4 specified that tariff revisions made by FERC were to be used, not theoretical transportation rates, which were used by ASBCA. Further, there was no substantial evidence in the record which supported the theoretical rates. To the contrary, two industry experts testified that the method employed by Petitioner was in compliance with industry standards. If the ASBCA intended to use theoretical rates, those rates should have been determined in compliance with the industry standard for calculating such costs. The Federal Circuit Court of Appeals did not detail what substantial evidence it relied upon from the record. The record is devoid of any testimony supporting the use of theoretical rates.

The second element of Quantum — recovery for lost profits — was denied by the ASBCA as well because the ASBCA found Petitioner did not present proof of its

damages for lost profits. In the Entitlement Decision, the ASBCA held that lost profits should be measured by the difference in Contract price for the natural gas and the actual price paid for the gas. This method was altered by the Quantum Decision which held that lost profits should be determined by the difference between the Contract price and all costs Petitioner incurred to deliver gas. The Federal Circuit Court of Appeals upheld the Quantum Decision because it could determine no basis to find an abuse of discretion by the ASBCA. (App. A, p. 7a)

Petitioner's contract was a Requirements Contract which obligated Respondent to purchase all of its gas exclusively from Petitioner during the six-month base period with two six-month option periods. If Petitioner's delivery of gas was curtailed or interrupted, the North Shore Gas Company (North Shore), a local supplier to Respondent, would stand by to make up any deficiency in the supply of natural gas. Respondent purchased natural gas from North Shore during several months while Petitioner's contract was in effect. The test applied to determine if a breach had occurred addressed three scenarios: (1) when Petitioner was "bumped off" the natural gas pipeline; (2) when an illegal daily cap was applied; and (3) when the Petitioner elected not to furnish gas beyond the amount stated in the requirements. When any of these scenarios occurred, then the Government could purchase gas from North Shore. The ASBCA found Petitioner was prevented from delivering gas in November 1989 and July 1990 due to North Shore's daily cap. Thus, Petitioner was entitled to lost profits for those two months. In addition, Petitioner maintained from documents, obtained after the Entitlement Hearing, that the Government breached the contract in December 1989 by purchasing gas from People's Gas, Light & Coke (PGLC)

because the documents showed the Government purchased gas every day in the month of December 1989 from PGLC and not just the three (3) days in December when Petitioner was bumped off line.

Both the ASBCA and the Federal Circuit applied the wrong test for measurement of lost profits. The proper test is to determine the volume of gas purchased during the month in issue and then multiply the volume by the difference between the cost and contract price. The record contained the necessary financial data to make such a calculation. In fact, the parties' Stipulated Exhibits before the ASBCA substantiated the basis for the required calculation.

The ASBCA exhibited inability to arrive at a jury verdict determination of lost profits but was able to calculate, on a theoretical basis, damages for the transportation cost adjustment. The jury verdict technique is often used to determine the amount due a contractor when there are gaps in the evidence or the evidence is not completely persuasive. *Cibinic & Nash*, Administration of Government Contracts, Third Edition (1995) pp. 719-721. Where there is some evidence upon which a jury verdict could be based, it is error to deny a contractor's claim in its entirety when entitlement was established. *S.W. Electronics & Mfg Corp. v. United States*, 228 Ct. Cl 333, 655 F.2d 1098 (1981).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR RULINGS ON THE FUNDAMENTAL RIGHT OF A LITIGANT TO RECOVER DAMAGES DETERMINED UNDER THE FILED RATE DOCTRINE.

In *Freeman Gen., Inc. v. United States*, 918 F.2d 188 (Fed. Cir. 1990) the Federal Circuit Court of Appeals reversed a board decision that denied any recovery of damages due to lack of evidence from the Contractor proving the amount of the adjustment. The Federal Circuit held that it was error not to award a jury verdict in the amount of the Government's estimate of the value of the claim — which was in the evidence submitted to the Board. In the case at bar, the evidence consisted of Stipulated Exhibits from both parties. These Stipulated Exhibits contained undisputed information by which both lost profits and the transportation cost adjustment should have been calculated. This Court has recognized the same concept in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931). Lack of mathematical precision should not deprive the contractor of cost recovery where entitlement exists.

Petitioner presented its computation in accord with the ASBCA's finding in the entitlement opinion, *i.e.*, the tariff revision declared by FERC during the time gas deliveries were being made as documented by the revised tariffs. The ASBCA changed from this test to one requiring the most

direct evidence, *i.e.*, proof of payment by Petitioner to its suppliers. The Federal Circuit found this newly imposed standard of comparing theoretical transportation rates at time of award with those at time of delivery was not an abuse of discretion.

Petitioner maintains use of such theoretical rates was indeed an abuse of discretion for several reasons. First, Clause C.4 of the Contract did not require proof of supplier costs. Second, the contract price was the price which the Petitioner was to be paid by Respondent, regardless of what price Petitioner paid to its suppliers. The Federal Circuit stated that the contract price is the price paid by the Navy to Commercial Energies, Inc., not by Commercial Energies, Inc., to its suppliers. (App. A, p. 9a) If the Respondent wanted verification of what price Petitioner was paying its suppliers, then the Contract should have so stated this requirement. This Contract did not. Further, if the Respondent had any questions about the actual cost of transportation paid due to changes in the applicable tariffs, then the Respondent had the ability to audit payments to suppliers. The Respondent did not do so. To require Petitioner to prove up what costs were paid to its gas suppliers as a condition precedent to recovery is contrary to the test established in the Entitlement Decision which only required Petitioner to show FERC tariff revisions which affected transportation cost.

Third, the ASBCA had before it uncontroverted testimony from two gas industry experts who both verified that Petitioner had calculated the transportation cost adjustment in accordance with industry standards. Neither the ASBCA nor the Federal Circuit stated any rationale for rejecting this substantial evidence which supported Petitioner's claimed costs of $277,902.50.

The Contract clauses, C.4 and H.14, bearing on the Transportation Price Adjustments, clearly do not spell out the test applied by ASBCA and affirmed by the Federal Circuit. The best evidence as interpreted by ASBCA would place an extracontractual burden upon Petitioner. The phrase "affect the actual cost of transportation" did not equate, in the Entitlement Decision, to the requirement of showing actual costs paid to Petitioner's suppliers, as a component of any transportation price adjustment. If the ASBCA intended to impose that test, then that test should have been outlined in the Entitlement Decision. It was not. To the contrary, comparing the tariff in effect at time of bid with the final tariff revisions and subtracting the actual amounts paid to Petitioner by the Government is the only way damages can be properly determined.

Petitioner had no way of knowing that the test would be changed from proving up documented tariff revisions and the effect those revisions would have on the actual cost of transportation. Instead, Petitioner was held to a different test in its proof. Such action is contrary to the filed rate doctrine established by this Court.

II.

THE PETITION SHOULD BE GRANTED BECAUSE USE OF A THEORETICAL BASIS TO CALCULATE DAMAGES DEPRIVES A LITIGANT OF RELIANCE ON CONTRACTUAL STANDARDS FOR MEASUREMENT OF DAMAGES.

Petitioner maintains that an abuse of discretion has occurred as a result of the ASBCA decision, which was affirmed, because damages have been determined contrary

to the terms of the Contract and contrary to the test established in the Entitlement Decision.

Petitioner's transportation price was to be based upon a published tariff from FERC. This rate established by the tariff was contractually specified as being the governing standard by which any adjustment in transportation price would be determined. The ASBCA recognized this standard in the Entitlement Decision. The tariff imposed upon Petitioner not only the right, but the absolute duty to charge and collect at such rate, and a like duty to pay its suppliers. If there was any doubt or questions about whether Petitioner had, in fact, paid its suppliers, then an audit should have been performed by the Respondent.

When the Government contracts for transportation and delivery of natural gas, the Government is bound by the same rules that govern contracts entered into between private parties. *Standard Oil of New Jersey v. United States*, 267 U.S. 76, 45 S. Ct. 211, 69 L. Ed 579 (1925) Accordingly, Petitioner's right to recovery at the tariff rate cannot be circumvented or abridged by use of a theoretical rate. The ASBCA and Federal Circuit seek to employ an implied in-fact limitation (the amount paid to suppliers) not expressly set forth in the Contract. In effect, their position represents an attempt to vary the published tariff in question by comparing it to the suppliers' price to Petitioner. Petitioner is not seeking to recover on the basis of an implied in-fact price. Petitioner seeks to recover on the basis of tariff rates which have been established by FERC. Tariff rates were recognized in the Entitlement Decision as the proper standard to measure transportation price adjustment(s).

Since one element of Petitioner's contract dealt with a transportation price factor, which was not controlled by either party to the contract, the price of transportation was to be handled in the same manner as an equitable adjustment. If the tariff rate went up or down, the Petitioner's recovery would be adjusted accordingly. To the extent that another agency (FERC), not a party to the contract, controlled the element of transportation price, then there is a fundamental difference in cost impacts upon both the user and the procuring party. That fundamental difference means that the tariff rate once formally published becomes binding upon both parties, regardless of any other consideration or attempts to evade them, innocently or otherwise.

In the field of transportation, both parties are charged with knowledge or notice of the published rate and that rate is by law a part of the contract. Contracts containing a rate other than the tariff rate cannot be enforced in the Courts as to such illegal rate, nor can recovery be allowed for breaches of the rate provision of such a contract. Strict adherence to that doctrine by the Courts may appear unfair to the individual user or shipper, in view of principles of equity and justice, since the shipper to whom the illegal lower rate has been granted may enter into a contract with others, in ignorance of the established rate. Requiring such a shipper to pay the higher rate, established by the approved tariff, may result in significant loss to the shipper. However, the Courts have uniformally allowed collection at the higher published rate, regardless of the negligence or actual fraud in quoting a lower rate, since otherwise the public policy designed to benefit the public as a whole would be undermined. *Hughes Transportation, Inc. v. United States*, 121 F. Supp. 212 (Ct. Cl. 1954).

The ASBCA's use of theoretical rates, as found by the Federal Circuit Court of Appeals, constituted an abuse of discretion because its action abrogated the pricing scheme set forth in the Contract. Such action also violated the filed rate doctrine which can only be modified if the rate is shown to be unreasonable. *Keogh*, *supra* at 163. No findings were made nor was any proof submitted on the issue of unreasonableness before the ASBCA. Accordingly, the ASBCA's substitution of theoretical rates violated the filed rate doctrine.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW WILL HAVE A SIGNIFICANT EFFECT UPON FEDERAL PROCUREMENT BY ENABLING AN ADMINISTRATIVE BOARD TO USURP A RATE-MAKING FUNCTION EXCLUSIVELY ASSIGNED BY CONGRESS TO FERC.

Petitioner incorporates by reference its citations set forth under "Statement of the Case" which required the ASBCA and the Federal Circuit Court of Appeals, under the "filed rate" doctrine, to apply FERC's published rates. In addition to that doctrine, however, Petitioner maintains that allowing the decision affirmed below to stand will cause a significant effect upon other government contractors who rely upon contractual terms to establish measurement for payment.

The purpose of Contract Clauses C.4 and H.14 is evident from the Contract language. Clause C.4 obligates the Contractor to a fixed price for gas delivered to the City

Gate unless the regulatory authority changes the tariff and this change affects the actual cost of transportation to the City Gate. The baseline against which to measure the affect of any change in the tariff rates was the fixed price upon which the Contract was based. This evidence established that the bid price for transportation was $.32521 per decatherm. Petitioner was paid throughout performance at this price. FERC's tariff rates were established at a later time. The two industry experts explained that the natural gas industry had arrived at an established formula for measurement of increases/decreases in transportation prices caused by tariff rate changes. Instead of using the Contractor's bid rate for transportation costs, the experts calculated the stipulated tariffs revised by FERC in each month in which transportation costs were either increased or decreased. Then, these costs were measured against the price which Petitioner had been paid which resulted in quantum of $277,902.25 due Petitioner for the adjusted transportation price changes.

The ASBCA penalized Petitioner by ignoring expert testimony, by disregarding the Respondent's quantum calculations, and ultimately by using a new and different test by which to evaluate quantum.

Government contract law clearly recognizes that a contractor's proof of damages does not have to be always subjected to the standard of proof requiring actual costs unless there is a contract clause recognizing the requirement for such actual costs. In *Northern Helex Co. v. United States*, 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert. denied*, 428 U.S. 866 (1976), the Court held at pp. 875-76:

> The basic rule for awarding common law damages for a breach of contract is stated as follows in *Restatement of Law*, Contracts, § 329(a):
>
> In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the least cost to the Defendant and without charging him with harms that he had no sufficient reason to foresee when he made the Contract . . .

In *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 351 F.2d 956 (1965), the Court held the standard of proof is satisfied if a reasonable basis for computation of the amount is established by stating:

> A claimant need not prove his damages with absolute certainty or mathematical exactitude . . . [cites omitted]. It is sufficient if he furnishes the court with a reasonable basis for computation . . . [cites omitted]. Yet this leniency of the actual mechanics of computation does not relieve the contractor of his essential burden of establishing the fundamental facts of liability, causation and resultant injury . . .

The contractor's burden of proof to establish entitlement appears to be more strictly enforced than the burden of proof relating to damages, or quantum. Petitioner met its burden and convinced the ASBCA entitlement existed. Petitioner also met its burden of proof by providing a reasonable basis for computation of the amount of damages. Petitioner

offered proof as required by the contract and as required by the Entitlement Decision. In addition, Petitioner offered proof from two experts in the natural gas industry. The ASBCA had before it sufficient evidence on which to base a quantum award not based on jury verdict methodology. Yet the Quantum Decision was based on a jury verdict which used theoretical rates. This was error as a matter of law because the ASBCA and Federal Circuit did not make the appropriate findings necessary for jury verdict methodology: (1) there was clear proof the contractor was injured; (2) there was no more reliable way of computing damages; and (3) the evidence was sufficient to make a fair and reasonable approximation of damages. *WRB Corp. v. United States*, 183 Ct. Cl. 409, 425 (1968).

No findings were made on any of those factors, and yet a jury verdict was rendered based on theoretical charges.

Damages for loss of profit were denied altogether, despite the Entitlement Decision upholding liability for such lost profits. Petitioner maintains sufficient evidence existed in the record before the ASBCA to make a jury verdict determination, similar to what occurred on the transportation price adjustment.

There can be no doubt that Petitioner suffered injuries for which damages are due. Petitioner's proof constituted reasonably adequate data which should have been used in the manner specified in the Contract and so recognized in the Entitlement Decision. Disregarding such information violates Petitioner's right to receive damages as relief for established entitlement issues.

CONCLUSION

It is curious that neither the opinion from the ASBCA (App. B) nor the Opinion from the Federal Circuit Court of Appeals (App. A) contain any citation of case law. Without any precedent being given for the use of theoretical rates, Petitioner is placed at a severe disadvantage in attempting to discern what legal basis exists for either Opinion. Given the "filed rate" doctrine, and the implications that flow therefrom, it is very clear that an abuse of discretion has occurred when the tariff rate set by FERC was not applied. Giving such deference to theoretical rates violated the filed rate doctrine, which requires use of the filed rate. Moreover, both the ASBCA and the Federal Circuit have misconstrued what financial data should be examined to determine if the change in tariff rate has affected the actual cost of transportation. Petitioner's supplier costs have no relationship to whether Petitioner's payments under the Contract were made in compliance with tariff rates set by FERC during the life of the Contract. Mathematically, there must be a cost baseline against which tariff revisions can be compared. This baseline requires payments made under Petitioner's Contract to be compared to FERC's tariff rates and applied to the volume of gas delivered. This is the methodology used by Petitioner and validated by two (2) experts in the natural gas industry.

Similarly, calculation of lost profits should be premised upon putting the Petitioner in as good a position as it would have been if no breach had occurred. The purpose of a Requirements Contract is to commit purchase of a definite quantity of gas unless Petitioner is unable to furnish said quantity. Petitioner's supply was only curtailed three (3)

days in December, 1989. Yet Respondent ordered from another supplier every day in December. For the other two (2) months in which a breach occurred, Petitioner provided sufficient proof for determination of lost profits by subtracting the costs paid from the prices charged for the volume of gas furnished.

Certiorari should be granted to correct the errors described herein.

Respectfully submitted,

JAMES A. MUNDT
Counsel of Record
WARREN & MUNDT, P.C.
Attorneys for Petitioner
405 South Cascade Avenue
Suite 301
Colorado Springs, Colorado 80903
(719) 578-1152